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Mr. Dexter Thomas
EDI Comments
PACA Branch
Fruit and Vegetable Programs
Agricultural Marketing Service
U.S. Department of Agriculture
Room 2095-S
1400 Independence Avenue, SW
Washington, DC 20250-0242

Dear Mr. Thomas:

Driscoll's applauds the effort to initiate a discussion about electronic data interchange (EDI) and the impact on the PACA trust. In light of the uncertainty that has developed around EDI and the trust language, it is important that PACA establish clear rules consistent with the statutory duty to protect the sellers of perishable agricultural commodities.

Like many shippers, Driscoll's has had to confront the issues raised by the Advanced Notice of Proposed Rulemaking (ANPR). There are times that a shipper cannot be sure that the trust notice transmits to the buyer and there are times that buyers have expressed a desire to avoid including the required language in the EDI billing. When necessary, Driscoll's preserves the trust for the benefit of our growers by means of a separate invoice statement to buyers. The issue of EDI systems filtering out PACA trusts is most acute for growers' agents like Driscoll's. We have a duty to our growers to preserve their trust rights but are confronted with billing systems that fail to provide assurance of the transmission of the trust notice. Under the current uncertainty, a grower's agent risks liability while the intended trustee avoids responsibility.

Over 50 years after PACA began, Congress in 1984 created the PACA trust to protect sellers of produce. The House Report accompanying the legislation contained the rationale for the creation of the trust:

Producers and shippers of perishable commodities are, for the most part, small size businesses. The process of growing, harvesting, packing and shipping perishables is a real gamble; costs are high, capital is tied up in farm land and machinery, and returns are delayed until the crop is sold. If the grower-shipper cannot realize any returns on the sale of the crop when due, he may not be able to survive. Thus, where business failures or reorganizations occur on the part of buyers of their crop, the growers are usually the parties

least able to withstand the losses and inevitable delays which result in such actions.

In 1995, Congress considered two bills on PACA. One, H.R. 669, sought to repeal the law. After lengthy negotiations, Congress instead passed and the President signed H.R. 1103, which reaffirmed the trust. Among other things, this legislation created a “paperless” method in which a licensee could preserve the trust by including specified language on the ordinary and usual billing or invoice. Congress recognized the importance of the trust protection while it accommodated changes in the marketplace and avoided duplicative paperwork. In implementing these legislative changes, PACA confirmed that electronic billing may serve as the ordinary and usual billing method so that trust notification may be conveyed electronically.

The questions raised in the ANPR distill to the issue of PACA’s legal authority to issue rules that govern the transmission of information through EDI. The Supreme Court has made clear that an administrative agency’s construction of a statutory provision it is entrusted to administer is given substantial deference. Judicial reliance on the agency’s judgment is greatest where an agency must employ specialized knowledge of the particular industry it seeks to regulate and courts have repeatedly cited PACA’s familiarity with the “problems inherent in the produce industry” to uphold disciplinary actions. *JSG Trading Corp. v. USDA*, 235 F. 3d 608, 617 (D.C. Cir. 2001) (upholding license revocation for commercial bribery); *County Produce v. USDA*, 103 F. 3d 263, 267 (D.C. Cir. 1997) (upholding license revocation for employing a person barred from industry).

Agencies may issue rules reasonably related to their enabling statute. Courts will defer to an agency’s power to fill gaps in the legislation unless those rules are “arbitrary, capricious, or manifestly contrary to statute.” The fact that Congress did not explicitly authorize PACA to mandate the trust language in EDI systems does not mean that PACA lacks the power to require this. Congress’ mandate to allow the use of ordinary billing provides PACA the authority to regulate billing procedures because EDI is reasonably related to PACA. Moreover, while PACA has historically relied on its investigatory power to police the industry, that does not diminish its inherent power to announce broadly applicable rules. An agency has the discretion to elect between rulemaking and *ad hoc* adjudications to carry out its mandate. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 611 (1991). The 1995 amendments to PACA limited PACA’s ability to initiate its own investigations. In the past, PACA could inquire into practices that may violate PACA but now the agency may launch an inquiry only upon receiving a written complaint. This further argues for PACA to issue rules on EDI to ensure industrywide compliance rather than police the industry solely through investigations.

PACA published the ANPR to craft rules to stop billing methods that interfere with the PACA trust. While it is appropriate to gather this information, the authority to take action is clear and Congress expects the agency to use its expertise to solve these issues and ensure the viability of the trust it created.

In fact, PACA has an obligation to act when a buyer acts to take away the rights Congress gave to sellers. The seller has the sole responsibility under the statute to preserve the trust and a seller may use ordinary billing methods to carry out the obligation to preserve the trust. Not surprisingly, the PACA regulations make clear that interfering with the trust violates the Act:

Commission merchants, dealers and brokers are required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act (7 U.S.C. § 499(b)).

Similarly, PACA defines dissipation as any act that could prejudice or impair the ability of unpaid suppliers to recover money owed. Thus, a buyer's attempt to inhibit the seller's effort to preserve the trust by a billing system that does not accept the mandated language is a unfair trade practice.

Putting aside the technology issues, USDA would never allow a buyer to order a shipper to omit the trust language on a paper invoice. That violation should be no less clear because the buyer has created a billing system that effectively screens out the necessary language. In 2002, PACA analyzed a similar issue that threatened trust rights. A food service operator told suppliers to send bills (and therefore the trust notices) to third parties. Like with EDI systems, it was not clear that there was an intent to evade the trust but that was the likely result because the buyer never received the notice. In that case, PACA took decisive action.

Principles of the trust law also demand action by PACA. A trust created by PACA is governed by general trust principles. When the goods are transferred, the trust is immediately established and the buyer assumes the obligations of a trustee. *Albee Tomato Co. v. Korea Commercial Bank*, 282 F. Supp. 3d 6, 11 (S.D.N.Y. 2003). The fact that the seller has to preserve the trust -- either through its regular billing or within 30 days by separate notice -- does not diminish the obligations that arise immediately upon the establishment of the trust. Most important, these duties include a fiduciary duty the buyer owes the beneficiary of the trust. Action to defeat the trust by blocking the transmission of the trust language is a violation of a trustee's duty of loyalty.

The ANPR raises several practical questions such as who should bear the costs associated with the regulation. While these are legitimate issues, they cannot serve as a basis for allowing the EDI to neutralize the protections Congress intended. Indeed, Congress anticipated that the extraordinary remedy of the trust would generate certain costs but decided that the savings from an efficient and fair marketplace outweigh these costs. The whole point of the trust is to favor sellers of produce over other creditors -- in effect, imposing costs to protect sellers.

Once PACA makes clear what the rules are, then the necessary systems will develop to accommodate the trade practices. The uncertainty in the current system creates many of the costs PACA now cites. Because it was apparently acceptable to avoid the trust language in EDI, some programmers created systems that did not carry this. It may be appropriate to provide sufficient notice to accommodate changes to computer systems, but this should not allow sellers to "lock in" the ability to disregard trust language. If PACA concludes that it must delay

implementation of any EDI rules, it should confirm that when EDI systems reject the trust language buyers must accept trust notices sent by alternative means.

On the pressing issue of EDI, PACA must set forth the rules and the requirements, which the industry will then follow. Clear, unambiguous standards will lower costs by removing uncertainty over these issues.

Thank you for your consideration of these issues.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Michael Hollister". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "Hollister".

Michael Hollister
Senior Vice President
Sales & Marketing

cc: Mr. Lloyd Day
Mr. Robert Keeney
Mr. Miles Reiter